No. 10874

IN THE

United States
Circuit Court of Appeals

For the Ninth Circuit

JOSEPH P. BOYLE and EDWARD HAFT,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA

BRIEF OF APPELLANTS

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STATEMENT OF FACTS AND PLEADINGS

This is an action for a forfeiture of 406 bottles of distilled spirits, for an alleged failure to pay a $2.00 per gallon floor tax under the provisions of sub-division (j) of Section 2800, Title 26, U. S. Code, due and payable November 1, 1942. The seizure was made April 20, 1943 by U. S. Internal Revenue Agents under Section 3720, Title 26, U. S. Code (R. 4).

A Libel of Information for condemnation was filed May 25th, 1943 alleging jurisdiction under Section 3723 (a) Title 26, U. S. Code (R. 2), and a warrant of arrest and monition (R. 21-24) was issued and a Notice of Seizure duly published (R. 7-11), and on June 2, 1943, Joseph P. Boyle and Edward Haft, the appellants herein, filed their "Claim and Intervention of Owners and Answer to Libel." (R. 11-19.)

The Libel of Information (R. 2-4) alleged the seizure by Internal Revenue officers of 406 bottles of distilled liquor, consisting of whiskey, brandy, rum and gin, containing 60.9 proof gallons of alcohol from the Atlas Bar at 137 East Park Street, Butte, Montana, which was occupied as a saloon, where such liquors were held, intended for sale, and sold for beverage purposes and alleged that the said liquors were kept and maintained for the purpose of being sold in fraud of the Internal Revenue laws and with design to avoid payment of the taxes levied thereon, i. e., the aforesaid floor tax.

The answer of the Claimants alleged that they were duly licensed retail liquor dealers, licensed by the United States to sell intoxicating liquor at retail. They admitted the jurisdiction of the Court and the levy of the floor tax and that the liquors were in their place of business for purposes of sale and admitted that the Government seized the 406 bottles on the 20th day of April but "deny that any of the liquors seized by the agents of the United States Government * * * was subject to any unpaid internal revenue taxes of any kind, character or description and allege the fact to be *that all taxes*

had been paid on each and every one of the 406 *bottles of distilled liquors named as libelee herein."* (R. 12, para. V); and as an affirmative defense in propounding their claim of ownership, the claimants and intervenors alleged their ownership and operation of the Atlas Bar; that they were retail liquor dealers duly licensed by the United States to engage in such business and to sell intoxicating liquor at retail and that the seizure was done by the agent in charge of the alcoholic tax unit, acting under the direction and jurisdiction of the Collector of Internal Revenue, purporting to act under Section 3720 of Title 26, U. S. Code "without search warrant, or warrant of any kind, and without authority of law, did take from the possession of these intervenors 406 bottles of distilled liquor containing 60.9 proof gallons of alcohol," and describing the liquor, (R. 14-16); that the claimants were the owners and in possession of those liquors and were duly authorized by the United States Government to sell such liquors at retail, (R. 17) and that:

> *"All Federal taxes on each and every one of said bottles of intoxicating liquors, or distilled spirits, had been paid in full long prior to April* 20, 1943, *the date of seizure; and that none of said liquor, at the time of seizure, on April* 20, 1943, *or at* 137 *East Park Street, was contraband in the sense that no Federal tax had been paid thereon."* (Italics ours.)
>
> "That these intervenors *had paid the floor tax imposed by the Internal Revenue Act of* 1942 *on such of said liquors as was in the possession of these intervenors on November* 1, 1943; and that all of such liquors were purchased by these intervenors from the Montana State Liquor Store, and at the times of said respective purchases said liquors, and

all thereof, had had the Federal tax paid thereon.

"That all of said bottles bear internal revenue stamps, showing the tax thereon to have been paid, with the exception of wines, if any, which show the tax receipts and tax stamps upon the original packages.

"That no just or legal cause existed on April 20, 1943, for the seizure or withholding from these intervenors of said property." (R. p. 17-18.)

It was further alleged in the Answer (R. 18) and admitted in the Reply (R. 25), that at the time and place of said seizure, the Government agents took and withheld all invoices, receipts for taxes paid and all bills, receipts and other evidences of purchase and tax transactions then in possession of the Intervenors. The Answer and the Claim of Intervenors was filed June 2, 1943 (R. 20) and the Reply of the Libelant was served and filed June 7, 1943.

An immediate effort was made by both the Government and the Intervenors to set the matter for hearing but because of the press of other business, the Court was unable to fix a date for hearing. A second motion for setting this case for trial was made on August 27th (R. 28). No setting having been made, counsel for the Intervenors and Claimants, the Agent in charge of the Alcoholic Tax Unit, and an assistant U. S. Attorney, Roy F. Allan, agreed to compromise all pending matters (R. 74-80). In settlement and compromise, the Internal Revenue Department requested, and the claimant paid $446.26 (R. 76-77). This money was transmitted to the Attorney General (R. 78-79), and thereafter upon de-

mand of the Investigator in charge of the Alcoholic Tax Unit, the additional sum of $395.76 to complete the compromise was paid (R. 79).

Two months after the compromise, and on December 13, 1943, the Court, of its own motion, set the case for trial for Tuesday, December 21, 1943 (R. 79).

Upon receipt of the copy of the Order setting the case for trial, counsel for intervenors immediately wrote to Mr. Roy F. Allan, Assistant United States Attorney at Billings stating that the case had been set for hearing and requested a continuance of the setting, in view of the settlement and compromise (R. 80). To this Mr. Allan replied that he had re-submitted the offer in compromise of both criminal and civil liability to the Attorney General with the recommendation that the offer in compromise be accepted and that he would advise counsel further (R. 80). Counsel for the intervenors, believing that the case would be vacated or dismissed did not notify Haft and Boyle, his clients, of the setting of the case for trial on December 21, 1943, and took no other steps preparatory for trial.

On the morning set for the trial, the Court denied the power of the government officials to compromise a case pending in his Court and refused a continuance and insisted on proceeding to trial over the objections and protests of counsel for intervenors and in the absence of both intervenors. Owing to the absence of Claimant Haft from the city, it was impossible for intervenors to show the facts surrounding the taking of the original inventory after midnight of October 31, 1942 (R. 88-92).

The United States Attorney called to the attention of the Court the fact that an offer in compromise had been made and was under consideration by the Attorney General (R. 31-32).

At 10:30 A. M. counsel for intervenors produced the correspondence with the Government officials and requested a continuance to the following Monday morning. That was likewise denied. During the cross examination of the Government Agent, Cosgriff, counsel for intervenors asked that the seized liquor be produced in Court (R. 33), which was denied, and the exception of the claimant and owners to the ruling of the Court was duly noted.

At the conclusion of the Government's case, counsel for claimants called to the attention of the Court the absence of Mr. Haft and asked to have the proof of claimants case continued until the following morning at 10:00 o'clock, (R. 35). This was likewise denied.

In the course of examination of witness McGarry, the accountant who made up the tax returns (Exhibits 1 and 2), his worksheet (Exhibit 4) and the original inventory (Exhibit 5), were exhibited to him, and after he stated that he did not know in whose handwriting Exhibit 5 was, the Judge directed the witness to leave the stand, (R. 34).

The exhibits were not received in evidence because no proper foundation could be laid under the circumstances, (R. 34).

Counsel thereupon stated that his next witness, Ed Haft, who took the inventory, would connect up the

testimony relative to Exhibit 5, and stated that Witness Haft was on his way from Missoula and moved that the Court recess until 4:30 o'clock, (it was then about 3:00 o'clock). This request was also denied.

The Court thereupon made its findings of fact and conclusions of law, forfeiting the 406 bottles of liquor and denied claimants and intervenors the right thereto, (R. 36-40). Formal findings of fact and conclusions of law were signed and filed December 23, 1943 and a Decree of Forfeiture in accordance therewith was signed and filed by the Court on the same date, (R. 65-68).

Thereafter and within 10 days, to-wit: on December 31, 1943, intervenors filed a motion for Rehearing, New Trial, or Review (R. 69-73), and therewith filed the affidavits of Earle N. Genzberger (R. 73-83), McGarry (R. 84-86), Boyle (R. 86-87) and Haft (R. 88-92), to which the Government, on January 4, 1944 filed objections (R. 92-94) with a counter-affidavit of R. Lewis Brown (R. 95-98). Thereafter and on April 14, 1944 (R. 99), the Court set the Motion for a Rehearing, New Trial or Review for hearing on April 22 (R. 99), and on April 22, 1944, after argument, the Court denied the Motion and granted an exception to the ruling (R. 100-101).

Within 90 days thereafter and on June 20, 1944, a Notice of Appeal was filed by the intervenors (R. 104) and the Appeal was thereafter perfected by giving bonds for costs and stay of proceedings, (R. 105-110).

In preparation of the Record of Appeal, counsel for intervenors prepared a Narrative Statement of the Evi-

dence under Rule 75 (c), there having been no official stenographer present at the trial and no transcript of the testimony available. Later this Narrative Statement was stricken from the Record by the District Court, and following that ruling, the Clerk of the Court below has refused to certify the Narrative Statement to this Court, (R. 115-116).

However, appellants are submitting this Appeal upon the pleadings and the minutes of the Court, the written exhibits and the affidavits and counter-affidavits filed in connection with the Motion for a New Trial. These, we believe, are sufficient to present the questions which appellants are urging as reversible error in this appeal.

Jurisdiction of Appellate Court

The Motion for New Trial was filed within eight days after Notice of Entry of Judgment (R. 69-73), and the Notice of Appeal was filed within ninety days of the denial by the Court below of that Motion (R. 69, 104), which gives to this Court jurisdiction of the Appeal.

See Fed. Rule 59;

O'Brien's Manual Fed. Appellate Procedure, p. 39, also 1943 Supp. p. 13, and cases cited.

Questions Presented

In this Court the appellants contend that in view of the original floor tax return and the payments of the taxes therein computed, a substantial sum, followed by the compromise procedings and the payments by the ap-

pellants of the demands of the Government thereupon, prior to the setting of the case for trial that:

1. The Court below abused its discretion in:
   (a) denying the Motion of the appellants for a continuance of the trial (R. 32),
   (b) in refusing a recess to the following morning at 10:00 o'clock (R. 35, line 5), and
   (c) in refusing a recess from 3:00 P. M. to 4:30 P. M. (R. 35) to enable intervenor Haft to appear as a witness in his own behalf, (R. 35).
2. The Court abused its discretion in denying intervenors' Motion for New Trial, based on the grounds of surprise, mistake, and excusable neglect which ordinary prudence would not have guarded against (R. 69-73, R. 100-101).
3. The Court erred in denying the oral and written Motion of Intervenors for the producing in Court of the liquors, which the Government's witness contended was not tax paid (R. 33, line 3 et seq., R. 34, line 8, R. 30).
4. Is a forfeiture permissible where the pleadings and proof merely shows an erroneous return?

Specification of Errors

1. The Court erred in denying the Motion of Claimants and Intervenors, herein, for continuance of trial of said cause. (R. 32.)
2. The Court erred in denying the request of said Claimants and Intervenors for production of offending liquor in Court for use on cross-examination of the witness, J. H. Cosgriff. (R. p. 33.)
3. The Court erred in denying the formal motion

of Claimants and Intervenors to compel the Government to produce offending liquor in Court. (R. p. 30 and p. 34.)

4. Denial of the Motion of Claimants and Intervenors to dismiss said cause made at the close of the Government's case. (R. p. 57 and p. 34.)
5. Abuse of discretion in denying Claimants and Intervenors' Motion for recess to permit the attendance of the witness Ed Haft who was a necessary witness on behalf of said Claimants and Intervenors to prove the case of said Claimants and Intervenors from 3:00 P. M. to 4:30 P. M. on Tuesday, December 21, 1943. (R. p. 34-35.)
6. Abuse of discretion in denying Claimants and Intervenors a recess from 3:00 P. M. on December 21, to 10:00 A. M. on December 22, 1943 in order to enable Ed Haft, principal witness of Claimants and Intervenors to be present and to testify. (R. p. 34-35.)
7. The Court erred in refusing to premit the witness, C. D. McGarry to complete his testimony and in ordering the attorney for Claimants and Intervenors to call his next witness. (R. p. 84.)
8. The Court erred in denying and overruling the Motion of Claimants and Intervenors to dismiss the proceedings, made at the close of all the evidence on all the grounds stated in said motion.
9. There was introduced in this case no evidence sufficient to support the facts as found by the Court of the conclusions of law based thereon.
10. The Court erred in entering a judgment of Forfeiture and entering a Decree against Claimants and Intervenors, herein.
11. The Court erred in overruling and denying Claimants and Intervenors' Motion for Rehearing, New Trial or Review on all grounds stated in said motion. (R. p. 69-73, p. 100.)

ARGUMENT

The Court erred in denying the Motion of Claimants and Intervenors, herein, for a continuance of trial of said cause. (R. 32.)

Abuse of discretion in denying Claimants and Intervenors' Motion for recess to permit the attendance of the witness Ed Haft who was a necessary witness on behalf of said Claimants and Intervenors from 3:00 *P. M. to* 4:30 *P. M. on Tuesday, December* 21, 1943. (R. 34-35.)

Abuse of discretion in denying Claimants and Intervenors a recess from 3:00 *P. M. on December* 21, *to* 10:00 *A. M. on December* 22, 1943 *in order to enable Ed Haft, principal witness of Claimants and Intervenors to be present and to testify.*

The Court erred in overruling and denying Claimants and Intervenors' Motion for Rehearing, New Trial or Review on all the grounds stated in said motion. (R. 69-73, 100.)

We believe it is most convenient to discuss the foregoing specifications of errors numbered 1, 5, 6 and 11 together.

The Court Below Abused Its Discretion

We enter into this argument with the rule in mind that granting or refusing of a Motion for Continuance and the granting or refusing of a Motion for New Trial is within the sound discretion of the trial court, but it is also elementary that the appellate court has jurisdiction

over such orders by a trial court where there is a manifest abuse of discretion.

> "While the elementary rule is that the granting or refusing of a continuance is within the discretion of a trial court,—a discretion which will not be lightly interfered with,—it is equally elementary that where it is manifest that there has been plain abuse of discretion, the duty to correct arises."
>
> *Guardian Assurance Company vs. Quintana, 227 U. S. 100, 57 L. Ed. 437, 33 S. C. 236.*

This Court has held:

> "The trial court is vested with discretion to grant and refuse continuances. This discretion should be exercised in such manner as to assure the parties a fair trial without undue delay. It is eminently proper that the trial of a cause should be deferred a reasonable time, to enable him to secure his evidence, and properly present his contentions."
>
> *Bedgisoff vs. Cushman (C. C. A. 9th) 12 F. 2d 667.*

In the case last cited, the Court held that where the action of the trial court is unwarranted, it is the duty of the Court of Appeals to interefere.

With reference to a Motion for a New Trial, the Supreme Court of Appeals for the 5th Circuit, says:

> "It is a general rule in Federal Courts that the allowance or refusal of a new trial rests in the sound discretion of the trial court and error cannot be assigned thereto * * * However, there are exceptions to both rules."
>
> *City of Amarillo vs. Emery (C. C. A. 5th) 69 F. 2d 626.*

"The 'discretion' here intended is a judicial discretion governed by the situation and circumstances affecting the exercise thereof. Even where an appellate court has power to review the exercise of such discretion, the inquiry is confined to whether such situation and circumstances clearly show an abuse of discretion, that is, arbitrary action not justifiable in view of such situation and circumstances."

Hartford-Empire Co. vs. Obear-Nester Glass Co. (C. C. A. 8th) 95 F. 2d 414, 417.

Taking up the facts of this case in the light of these and similar decisions, we find that six months after the original seizure, the claimants herein yielded to the opportunity of re-claiming their liquor, by complying with the terms of the Government's proposition outlined in the letter of D. E. Dineen, Investigator in charge of the Alcoholic Tax Unit (R. 76-77).

The compromise and settlement is also corroborated in the letter from the Assistant District Attorney (which also refers to the authorization of the Attorney General in Circular No. 3780), (R. pp. 78-79), and it is undisputed that later $395.76 additional tax was paid.[1]

It is fundamental that:

"Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law.

United States vs. One Model 1936 Ford, 307 U. S. 211, 215, 83 L. Ed. 1249; 59 S. C. 861;

Farmers and Mechanics National Bank vs. Dearing, 91 U. S. 29, 23 L. Ed. 196.

[1]—This included the original tax of $228.51 for which claim for Refund was contemporaneously made.

It is also the law that:

> "It is well settled that a failure due to honest mistake to file a required schedule does not involve penalties imposed for not making any return."
>
> *U. S. vs. Tillinghast (C. C. A. 1st) 69 F. 2d 718.*

It was entirely natural for counsel for the intervenors and claimants to consider, as he did, that his employment had been terminated through the payment by his clients of $446.26 plus $395.76, a total of $842.02 (R. 78-79), in addition to the sum of $228.51 paid November 30, 1942 (R. 41).

Under the circumstances, counsel for claimants and intervenors naturally neglected to secure the presence and services of the official court reporter on the morning this case was set for trial, believing that the United States Attorney would join in a request for a vacation of the setting. Indeed, the minutes of the Court show that the District Attorney did bring to the attention of the Court this compromise settlement:

> "Thereupon Mr. Brown stated that he desired to call to the attention of the Court the fact that an offer in compromise has been made herein, and that it is now under consideration by the Attorney General." (R. 31-32.)

And again:

> "Thereupon Mr. Genzberger stated to the Court that an offer in compromise has been made in this case and that he did not think that this case would be tried until the offer had been disposed of, and now moved the Court to continue the trial of this case until next Monday morning at ten o'clock (R. p. 31, lines 13 et seq.).

Later in the trial, the minutes of the Court show that:

> "Thereupon Mr. Genzberger asked that the letter of Assistant U. S. Attorney Allan, dated December 16, 1943, be placed in the Record, to which the Government objected." (R. 36, lines 11-14.)

Unfortunately, no record has been kept of the comments of the trial judge, which would have filled many pages of the record. We believe, however, that it will not be contradicted that he denied the power of Internal Revenue officials and the United States Attorney to settle or compromise a case of this character in his Court without his permission.

This power exists by express statutory provision *(See Section 3761, Title 26, U. S. C. A.)*.

The Circuit Court of Appeals of the Fifth Circuit said relative to proceedings under that Section:

> "If the defendant, in good faith made the payment of the tax and penalty for the purpose of compromising the impending criminal action, he is entitled to the full effect and benefit of it regardless of whether or not he followed any technical rules of procedure laid down by the Internal Revenue Department. And, if his offer of compromise was accepted, no criminal proceeding could thereafter be had for his failure to pay the tax before commencing business. There could be no doubt under the uncontradicted evidence in the record that he made the payment to prevent being prosecuted criminally, and the Deputy Collector certainly led him to believe it would have that effect. The Deputy Collector undoubtedly had the authority to at least transmit the offer of compromise, and when he turned over the payment to his superior it was his duty to disclose to him that it was an offer in compromise. It is to be presumed that he did so, and the fact that the

money was retained by the United States and the stamp issued to defendant would raise the presumption that the offer of compromise had been accepted."

Willingham vs. United States (C. C. A. 5th) 208 F. 137.

This was cited with approval in the later case of *Rau vs. U. S. (C. C. A. 2d) 260 F. 131,* where, in a like manner to the case here under consideration, the trial judge there held a compromise or an effort at compromise immaterial in a criminal proceeding, and in reversing that decision the Second Circuit Court of Appeals said:

"The Commissioner of Internal Revenue had the power and authority by virtue of the statute above referred to, and with the advice and consent of the Secretary of the Treasury, to compromise the criminal case as well as the civil case arising under the internal revenue laws. The compromise may have been made before the institution of the criminal proceedings or after. The provision relating to the necessary consent of the Attorney General evidently intends a compromise after the institution of a civil or criminal action. If the defendant, in good faith, made the payment of the tax and penalty for the purpose of compromising the impending action, he is entitled to full protection and the benefits derived therefrom. If the money was accepted with the promise of immunity from further punishment in a criminal proceeding, it would be a complete defense to this indictment.

Willingham vs. United States, 208 Fed. 137, 127 C. C. A. 263.

"The acceptance, not only of the tax, but of the penalty, coupled with the statement of the internal revenue officer, that payment would end the matter, and that there would be no indictment, if true, would

be a good defense. The fact that the money was retained by the United States is some evidence of its acceptance in compromise. * * * * As was said in *United States vs. Chouteau, 102 U. S. 603, 26 L. Ed. 246:*

> "He has been punished in the amount paid upon the settlement for the offense with which he was charged, and that should end the present action, according to the principle on which a former acquittal or conviction may be invoked to protect against a second punishment for the same offense."

RAU vs. U. S. (C. C. A. 2d) 260 Fed. 131, 133.

The denial of this power to compromise created by *Section 3761 of Title 26, U. S. Code,* has occasioned the entire miscarriage of Justice which has occurred in this case.

The Circuit Court of Appeals of the Fourth Circuit in *Oliver vs. U. S. (C. C. A. 4th) 267 Fed. 544,* after quoting the then Section 3229, now Section 3761, says:

> "Under this statute a compromise once effected, whether before or after prosecution, is as complete a discharge of the defendant as a verdict of acquittal by a jury." (Page 548.) And again:
>
> "It is of the highest importance that citizens, who deal with an officer of the government charged with an official duty, shall have the right to presume every instance, in the absence of positive proof to the contrary, that such officer did his duty." (Page 548.)

"It has been held that where a compromise was once made that the taxpayer could not later repudiate the compromise and sue to recover the money."

Schneider vs. U. S. (C. C. A. 6th) 119 Fed. 2d 215;
Aviation Corp. vs. U. S. (Ct. Cl.) 46 Fed. Supp. 491.

Certainly, if this were a suit between private individuals where money had been paid by the defendant to a plaintiff, it would be held unconscionable for the plaintiff to retain the money and then insist on proceeding with the lawsuit in the absence of the defendant and the defendant's witnesses.

The Courts of Montana have uniformly granted relief to a litigant injured through a failure of opposing attorneys to obey an agreement or stipulation. (See *Bullard vs. Zimmerman, 82 Mont. 434, 268 Pac. 512.)*

Likewise the Supreme Court of Oregon in *Voorhees vs. Geiser-Hendryx Inv. Company (Ore.),* 98 Pac. 324, 326, in discussing the power of the Court to relieve a party from a judgment order or other proceeding taken against him through his mistake, inadvertable surprise, and excusable neglect said:

> "An application under this Section is addressed to the discretion of the trial court; it, however, is not arbitrary, but should be exercised in conformity with the spirit of the law and in a manner to advance substantial justice. An erroneous exercise thereof is reviewable by this Court * * * * A Judgment taken against a party contrary to an understanding or agreement with his adversary is one taken by surprise within the meaning of the statute."
>
> *Voorhees vs. Geiser-Hendryx Inv. Company (Ore.) 98 Pac. 324, 326*
> cf. 1 Black on Judgments, p. 336.

Supplementing Federal Rule 59 relative to new trial, there was in effect in the United States Court for the District of Montana, Rule 74, providing:

"New Trials.

A new trial may be granted in an action at law whether it was tried with a jury or without one, for any of the following causes materially affecting the substantial rights of the losing party:

(1) Irregularity in the proceedings of the Court, jury or adverse party, or any order of the Court or abuse of discretion by which the losing party was prevented from having a fair trial;

* * * * *

(3) Accident or surprise which ordinary prudence could not have guarded against."

This Rule followed Section 9397 of the Revised Codes of Montana 1935 which was taken from Section 657 of the California Code of Civil Procedure and which adopts the same language as Section 9187 of the Revised Codes of Montana, taken from California Code of Civil Procedure, Section 473, which empowers a Court "to relieve a party or his legal representative from a Judgment, Order or other proceedings taken against him through his mistake, inadvertence, surprise or excusable neglect."

Under these Sections, the Supreme Court of Montana has held that:

> "This section was enacted for the very purpose of giving to the courts the power to relieve parties from judgments obtained against them by reason of mistake, inadvertence or excusable neglect, and in interpreting it courts should, in furtherance of justice, maintain the same liberal spirit which prompted its enactment. The rule is concisely stated by this court in *Nash vs. Treat, 45 Mont. 250, Ann. Cas.*

1913E. 751, 122 Pac. 745: 'Each case must be determined upon its own facts; and, when the motion is made promptly and is supported by a showing which leaves the court in doubt, or upon which reasonable minds might reach different conclusions, the doubt should be resolved in favor of the motion.' No great abuse of discretion by the trial court in refusing to set aside a default need be shown to warrant a reversal, for the courts universally favor a trial on the merits."

Brothers vs. Brothers, 71 Mont. 378, 383, 230 Pac. 60.

Reliance upon an oral agreement with adverse party, instead of written stipulation with his attorney, was held sufficient to show excusable neglect in *Koehler vs. D. Ferrari & Co., (Cal.), 156 Pac. 69.*

Likewise the rule is stated in the case of *Miller vs. Lee, (Cal. App.) 125 Pac. 2d 627, 629:*

"The power, vested in trial courts by Section 473 of the Code of Civil Procedure should be freely and liberally exercised to the end that the cases shall be disposed of according to their substantial merits rather than upon mere technical matters of procedure."

In that same case last cited, it was held that:

"The 'surprise' mentioned in Section 473 of the Code of Civil Procedure, from the effect of which it is within the power of the courts upon satisfactory showing to relieve a party, is sometimes defined to be some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against."

Miller vs. Lee, (Cal. App.) 125 Pac. 2d 726, 631.

Violation of an agreement to extend time to answer was also held with the term "excusable neglect, mistake, inadvertence or surprise" as defined in *Thompson vs. Connell et al, (Ore.) 48 Pac. 467, 468.*

We, therefore, submit to the Court that in view of all the circumstances, namely the fact that the intervenors and claimants did make a floor tax return showing some 112 proof gallons of distilled spirits, malt liquors and wines (R. 42-46), upon which they paid a substantial tax amounting to $228.51 (R. 41); that almost six months thereafter, a seizure was made of the entire stock in trade of these claimants upon the allegation that "certain distilled spirits in bottles, on which the above named tax was imposed and upon which the said tax had not been paid" (R. p. 4, line 8, et seq.); that thereafter, following negotiations with the proper Governmental officials, an offer in compromise was made and $446.26 paid (R. 76-77) and recommended by the District Attorney, pursuant to Attorney General circular No. 3780 (R. 78-79) and as part of the compromise, an additional tax of $395.76 was paid (R. 79) twenty-seven days prior to the date that the case was set for trial (R. 35); that counsel for intervenors was thereafter justified in assuming that the case would not be tried and that his neglect in failing to secure the services of a court reporter and to notify his clients and their witnesses to be present on the date of the trial was certainly *excusable* under the circumstances.

We call to the attention of this Court the fact that there was no jury in attendance in the District Court and

that this is not a case where the trial court had a congested calendar with numerous cases ready for trial with many litigants and attorneys waiting around. This was the only matter set for hearing on December 21, or until a much later date. There was no case set for trial in the United States Court for the District of Montana which would have prevented the District Judge from having set this matter for hearing on the following Monday, December 27, 1943, assuming that a trial was necessary.

There was nothing else set for hearing on December 22, 1943 which would have prevented the District Court from having recessed the case until 10:00 o'clock on that morning to permit Haft to return from Missoula and give testimony in the case. The record fails to show, and in truth, there was nothing on the Court calendar which would have prevented the Court from accommodating counsel and litigants so as to have permitted these claimants to have presented all their evidence and to have had their day in Court and show that their inventory was honestly taken and prove to the Court that there was no fraud on their part and no intent to evade the payment of taxes to the United States and to prove their allegations to the effect that all taxes were paid upon the seized liquor at the time of the seizure on April 20, 1943, almost six months following the date that the tax was due and five months after the record shows the floor tax was paid.

The action of the Court in forcing intervenors to trial during their absence, in refusing any recess during the progress of the trial in order to permit intervenor Haft

to appear as a witness in his own behalf, coming as he did a distance of one hundred twenty-four miles in order to be present at the trial was an abuse of discretion on the part of the Court below and arbitrary exercise of power on the part of the District Court from which, in the exercise of its appellate jurisdiction, this Court should intervene and grant these appellants relief from the forfeiture of their property.

II.

The Court erred in denying the request of said Claimants and Intervenors for production of offending liquor in Court for use on cross-examination of the witness, J. H. Cosgriff. (R. 33.)

The Court erred in denying the formal motion of Claimants and Intervenors to compel the Government to produce offending liquor in Court. (R. 30, 34.)

The minutes of the Court disclose that during the testimony of John H. Cosgriff, a witness for the United States, that the following proceedings were had:

> "Thereupon Mr. Genzberger asked that the seized liquor herein be produced in Court and admitted in evidence for examination by the Court, to which request the government objected. Thereupon Court ordered that the request be denied, and the exception of the claimants and owners to the ruling of the Court was duly noted." (R. 33, lines 3-9.)

Following the conclusion of the Government's case in chief and preparatory to presenting the case of intervenors and owners, the minutes of the Court show that:

"Thereupon the claimants and owners filed and presented to the Court a motion to compel production in Court the 13 pints and 1 quart of Cavalier Gin, described in Exhibit 3, and certain liquor store sales slips, invoices, etc., mentioned in the motion, to which the government objected as not timely made. Thereupon Court ordered that the motion be and is denied, to which ruling of the Court the claimants and owners excepted and exception duly noted." (R. 34.)

The Motion referred to is found on page 30, and omitting formal parts read as follows:

"Come now the intervenors and claimants, Joseph P. Boyle and Ed Haft, and move the above-entitled court for an order compelling the libelant to produce in Court the thirteen pints of Cavalier Gin and one quart of Cavalier Gin described in Exhibit "3" introduced as evidence in this case, and also to produce in Court and at the hearing of this action the liquor store sales slips, invoices, receipts for taxes paid, and all bills and other receipts, and other evidences of purchases and tax transactions, seized by the officers of the libelant from these claimants and intervenors on April 20th, 1943 at 137 East Park St., Butte, Montana, as alleged in Paragraph IX of the first affirmative defense of the intervenors herein and admitted in Paragraph I of the Reply herein.

Earle N. Genzberger,
Attorney for Intervenor and
Claimants.

(Served on District Attorney and Filed Dec. 21, 1943.)

It will be observed that this tax was levied under the provisions of Section 2800 (j) enacted October 21, 1942, 56 Stat., 970. This act reads:

"Upon all distilled spirits upon which the internal-revenue tax imposed by law has been paid, and which on the effective date of Title VI of the Revenue Act of 1942, are held and intended for sale or for use in the manufacture or production of any article intended for sale, there shall be levied, assessed, collected, and paid a floor stocks tax of $2 on each proof-gallon, and a proportionate tax at a like rate on all fractional parts of such proof-gallon."

Section 3 of paragraph (j) provides:

"All provisions of law, including penalties, applicable in respect of internal revenue taxes on distilled spirits shall, insofar as applicable and not inconsistent with this subsection, be applicable in respect of the floor stocks tax imposed hereunder. * * * * ."

Section 2802 of Title 26 provides for the issuance and use of stamps on distilled spirits.

The following Section, 2803, Title 26 provides:

"No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and *evidencing payment of all internal-revenue taxes imposed on such spirits.*" (Emphasis ours.)

Subsection (f) provides:

"All distilled spirits found in any container required to bear a stamp by this section, which container is not stamped in compliance with this section and regulations issued thereunder shall be forfeited to the United States."

Under the pleadings in this proceeding, the issue was whether or not the liquors seized on April 20, 1943 were

"contraband" in the sense that the taxes were not paid thereon. The intervenors claim that each and all of the bottles of liquor were tax paid. In accordance with that theory and feeling that the liquors themselves were the best evidence, counsel for the intervenors, on cross-examination of Government agent Cosgriff, requested that the seized liquor be produced in Court (R. 33). This request the Court denied and an exception of the claimants was duly noted (R. 33).

While *Section 2806, Title 26,* which is part of the chapter relative to taxes on distilled spirits provides for penalties and forfeitures, *Section 3720 of Title 26,* under which these proceedings were had, provides:

> "All goods, wares, merchandise, articles, or objects, on which taxes are imposed *which shall be found in the possession,* or custody, or within the control of any person, for the purpose of being sold or removed by him in fraud of the internal revenue laws, or *with design to avoid payment of said taxes, may be seized,* and shall be forfeited to the United States.
>
> (2) * * *
>
> (3) Equipment.
>
> All tools, implements, instruments, and personal property whatsoever, in the place or building, or within any yard of inclosure where such articles or raw materials are found, may also be seized, and shall be forfeited as aforesaid. * * *"

It will be noted that the foregoing statute is in the present tense, to-wit: *"Shall be found in the possession"* and *"Are found."* The question directly raised then in these proceedings was whether or not on April 20, 1943,

the day of seizure, the liquors seized, or part thereof, were not tax paid in fraud of the revenue.

> "Intent to defraud the United States of a tax is essential element and must be alleged and proved."
> *Hawley vs. United States, (C. C. A. 8th), 15 Fed. (2d) 621.*

Two elements were necessary, first, that the tax was not paid, and second that there was a fraudulent intent on the part of the owners and claimants to defraud the Government.

It stands admitted that a return was made by the claimants (R. 41-46), in which 112.28872 proof gallons of distilled spirits were returned, and a floor tax was paid of two dollars per gallon amounting to $224.58 was paid (R. 41).

It appears from the affidavit of Haft that the printed instructions from the Internal Revenue Department do not provide for the listing of brands of liquor on hand (R. 90). This also appears from the affidavit of McGarry (R. top p. 85).

It was the contention of the Government that the inventory of seized liquor (R. 55) contained the entries of "13 pints of Cavalier Gin and 1 quart of Cavalier Gin" which did not appear on Plaintiff's "Exhibit 1" (R. 44-45).

Intervenors' contention was that the brand "Old Mr. Boston Gin" which occurred twice on page 45 was an error on the part of the accountant in making up the return and that one of the entries should have been

"Cavalier" Gin instead of "Old Mr. Boston." (See Haft Affidavit, R. 90, McGarry Affidavit, R. 85.)

It was the contention of the intervenors that the bottles themselves would have disclosed stamps or other evidences of payment of taxes and the bottles with the invoices and tax returns, etc., would have established the dates of purchase of the gin in question. It is not an answer to this request for the production of the liquor in Court—what amounts to *"corpus delicti"*—that the Government admits that all these bottles bore proper revenue stamps because such admission would cause these proceedings to fail because such liquor would not then be "contraband." The liquor and the containers might be stamped with the date that the tax was paid thereon. It is probable that said containers, with the invoices and liquor store sales slips, pertaining thereto, would show the dates of their respective purchase.

Certainly, intervenors had a right to have the liquor produced in court and to cross-examine Government's witnesses with relation thereto.

The refusal of these two requests was a reversible error on the part of the Court below and the error is manifest from the minutes of the Court, without the necessity of a formal stenographic record herein.

III.

The Court erred in denying and overruling the Motion of Claimants and Intervenors to dismiss the proceedings, made at the close of all the evidence on all the grounds stated in said motion.

The Court erred in entering a Judgment of For-

feiture and entering a Decree against Claimants and Intervenors, herein.

The Court erred in overruling and denying Claimants and Intervenors' Motion for Rehearing, New Trial or Review on all the grounds stated in said motion.

At the close of the Government's case, intervenors filed a Motion to dismiss the Libel of Information and to refuse condemnation (R. 57). (See Minutes—R. bottom page 33, top page 34.) This Motion was denied by the Court and it is appellants' contention that the Court below erred in denying the Motion to Dismiss and that the findings of fact and conclusions of law of the Court below (R. 59-65) and the Decree of Condemnation based thereupon (R. 65-68) were each and both erroneous. In making this contention, appellants recognize the rule that in the absence of the transcript of the testimony, every presumption would be indulged by this Court in favor of the sufficiency of the proof below. Yet, we call to the attention of this Court that the Libel of Information is the same form used by the Government for the confiscation of illicit liquors in the days of the National Prohibition Act and in cases of the illicit manufacture of so-called "Moonshine Whiskey."

It stands admitted here that appellants, at the time of this seizure, were retail liquor dealers, licensed as such by the United States. The allegations of the libelant (Par. V, R. p. 4) are that on the 20th day of April, 1943, the Internal Revenue officers went into the premises of the appellants and "found therein and upon said premises, certain distilled spirits, in bottles, on which

the above named tax was imposed, and upon which, said tax had not been paid."

This allegation is equivalent to an allegation that no return was made as required by *subsection (2) of Section 2800 (j), Title 26, U. S. C., reading:*

> "(2) Returns. Under such regulations as the Commissioner with the approval of the Secretary shall prescribe, every person required by paragraph (1) to pay any floor stocks tax shall, on or before the end of the thirtieth day following the effective date of Title VI of the Revenue Act of 1942 make a return and shall, on or before the first day of the third month following such effective date, pay such tax. * * *"

and by the regulations promulgated by the Commissioner for the collection of the tax levied by *subdivision (j) of Section 2800 of Title 26, U. S. C.*

However, the minutes of the Court show (R. 32) that the Government introduced in evidence without objection, Plaintiff's Exhibit 1 by witness Neil D. McCarthy and Plaintiff's Exhibit 2 by witness John H. Cosgriff. It does not appear in the record as presented, but for the information of the Court, Neil D. McCarthy testified that Exhibit 1 (R. 41) was an official record of the collector's office, and John H. Cosgriff, who was the agent in charge of the Alcoholic Tax Unit of the Internal Revenue Bureau testified that Exhibit 2 was an official record of his office.

These Exhibits are before this Court (R. 41-53).

Therefore, it affirmatively appears upon the record that these appellants *did* make a return of their taxes levied under *Section 2800 (j)* and that in the return showed that they had on November 1, 1942, 112.28872

proof gallons of distilled spirits (R. 42); and the Record further shows the Collector of Internal Revenue filled in:

"Received with Remittance	
Nov. 30, 1942	"Dec. 2, 1942.....5107
Helena, Montana	Amount due $228.51
Collector Internal Revenue	Amount paid.....$228.51"

R. p. 42.)

The Government here has proceeded to enforce a forfeiture on the same basis as if no tax returns were filed based on the contention that a small portion of liquor, to-wit: thirteen pints and one quart of Cavalier Gin were omitted from the return (R. 34, lines 9-10; Demand page 30).

Defendant's Exhibit 3, which was the Government's list of seized liquor, discloses that the one quart of Cavalier Gin seized contained .20 proof gallons and that the thirteen pints of Cavalier Gin involved 1.30 proof gallons, a total of one and one-half proof gallons, for which alleged omission, $3.00 in additional tax would have been due and payable, and upon this slender thread the libelant has thus far enforced a forfeiture of the entire stock of liquor of the claimants and intervenors herein.

Section 2800 (j), Subdivision (3) of the Revenue Act of 1942, Title 26, provides:

> "All provisions of law, including penalties, applicable in respect of Internal Revenue taxes on distilled spirits shall, insofar as applicable and not inconsistent with this subsection, be applicable in respect of the floor stocks tax imposed hereunder."

Section 2800, Title 26 and the following Sections all deal with *distillers* and *wholesale liquor dealers.* It is highly questionable whether or not *Section 2800 (j)* has any applicability whatever to retail liquor dealers.

Walker vs. U. S. (C. C. A. 4th) 104 F. 2d 465.

However, assuming that the law does apply to retailers, *Section 3720,* under which these proceedings were brought provides in subdivision (a) (1):

> "All goods, wares, merchandise, articles, or objects on which taxes are imposed, which shall be found in the possession, or custody, or within the control of any person, for the purpose of being sold or removed by him *in fraud of the internal revenue laws, or with design to avoid payment of said taxes,* may be seized, and shall be forfeited to the United States."
>
> "It is well established that an erroneous or incorrect return is not necessarily a fraudulent return and that because a return is incorrect, that fact does not invoke the penalties for fraud."
>
> *National Bank of Commerce vs. Allen, (C. C. A. 8th) 223 Fed. 472, 478;*
>
> *Eliot National Bank vs. Gill, 218 Fed. 600, 603;*
>
> *U. S. vs. Tillinghast (C. C. A. 1st) 69 Fed. 2d, 718;*
>
> *Wilson Bros. vs. Commissioner of Internal Revenue (C. C. A. 9th) 124 Fed. 2d 606, 611.*

In a comparatively recent case, this Court in an income tax case clearly defined the difference between the penalties consequent upon the filing of no return and those incurred, if any, by reason of a false or incorrect return.

Lane-Wells Co. vs. Comissioner of Internal Revenue, (C. C. A. 9th) 134 Fed. 2d 977.

See also Sections 3612 to 3616, Title 26, U. S. Code.

Under *Section 3720* and under a long line of decisions, it is necessary for the Government to plead and prove that the return made by the appellants was false and in fraud of the Internal Revenue laws and with design to avoid payment of taxes.

The Court in its findings of fact (R. 62) did not find any fraud with reference to the making of the return (Exhibit 1) and did not find specifically that Exhibit 1 was even false or incorrect. The conclusions of law proceeded upon the same theory, as did the Libel of Information, namely, that this was a "no return case" and that appellants were bound to include in their return every bottle of liquor on the premises and that in case of omission or mistake that they forfeit to the United States their entire stock in liquor. This was not and is not the law, where as here, the possession of the liquor was not illegal and not illicit and where appellants were licensed retail liquor dealers.

As was said by the Circuit Court of Appeals of the Seventh Circuit in *Griffiths vs. Commissioner of Internal Revenue, 50 Fed. 2d 782* on this same subject:

> "The remaining question before us is whether petitioner was guilty of fraud with intent to evade the tax in making his return on March 14, 1920; and the burden of proving such fraud was upon respondent. Fraud is never presumed but must be

> determined from clear and convincing evidence, considering all the facts and circumstances of the case, and the presumption of Commissioner's correctness does not extend to his determination that fraud existed. *(J. B. Jemison vs. Commissioner of Internal Revenue (C. C. A.) 45 F. (2d) 4.")*

What is said in the case last cited also applies to the case here at bar. The affidavits offered to the Court on Motion for New Trial, and likewise the evidence which appellants attempted to place before the Court at the trial were to the effect that one of the appellants, Haft, took a physical inventory of the liquors in his place of business after midnight on October 31, 1942 and took the inventory up to John J. Walsh, a certified public accountant, for the purpose of having the proper returns made up; that John J. Walsh, the accountant, referred the matter to McGarry, one of his employees and that McGarry made up the return.

McGarry's affidavit shows that on the inventory was an entry of "Gin 80 proof, 3 quarts, 24 pints and 16 half pints," and that on the final return he changed the return 80 proof gin to 90 proof and called the same "Old Boston," whereas there was no name on original inventory." Another gin entry was "gin 85 proof, 12 half pints." The third was "Gin, Old Boston," 90 proof, 48 half pints;" and that he could not find in his liquor store list an 80 proof gin so he substituted the name "Old Boston Gin" at 90 proof. It was an error on his part

and resulted in having the taxpayer pay taxes upon the said forty-three bottles of gin on the basis of *90 proof* instead of *80 proof,* an increase of 12½%—"so that Haft and Boyle actually paid 12½% more tax upon the gin in question than they should have properly paid." (R. 84-85.)

The language of the Circuit Court of Appeals in the case last cited relative to the mistake of a bookkeeper is particularly relevant here.

Griffiths vs. Commissioner of Internal Revenue, 50 Fed. (2d) 782, 786.

We also contend that because revenue officers entered the place of business of the claimants on April 20, 1943 and found the gin upon which they contend that no tax was paid that that fact does not prove or tend to prove that that gin was in the possession of the claimants on November 1, 1942, and that the fact of possession on April 20, 1943 does not give rise to a presumption which works retroactively so that that is no proof at all of a possession on November 1, 1942.

Corbin vs. U. S. (C. C. A. 6th) 181 Fed. 296.

We submit that this point is actually determinative of this entire case and that the failure of the Court to find that Exhibit 1 was a fraudulent return made with intent to evade the payment of taxes is fatal to the Decree of Forfeiture herein and entitles appellants to a reversal of the Judgment with directions to dismiss the proceedings.

Conclusion

Appellants submit that on the record herein submitted, wherein the transcript of the testimony and the lengthy interpolations of his opinions by the trial judge have been omitted, that still it appears affirmatively from the minutes of the Court and from the Exhibits that the Court below clearly abused its discretion in refusing to recognize the compromise and in forcing appellants to trial after the statement of the District Attorney that the case was in the process of settlement.

It would be unconscionable for private litigants to enter into a settlement, retain the fruits thereof and then demand of a court that it proceed with the settled suit. It is none the less unconscionable here where the Government of the United States is involved.

We submit that on the pleadings and findings themselves, appellants are entitled to a dismissal of the action, and in the absence of this, to a reversal, with directions to grant a New Trial because of the errors complained of, i. e., the manifest of discretion by the Trial Court.

Respectfully submitted,
EARLE N. GENZBERGER,
Butte, Montana,
Attorney for Appellants.

Service of the foregoing Appellants' Brief acknowledged and three copies thereof received this 1st day of December, 1944.

John B. Tansil,
United States Attorney,

R. Lewis Brown,
Assistant United States Attorney.